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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1086

JERRY I. BLOOM

Petitioner,

v.

A.H. ROBINS COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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IN THE

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OCTOBER TERM, 1972

No.

JERRY I. BLOOM

Petitioner,

v.

A.H. ROBINS COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Civil Appeals for the Tenth Supreme Judicial District Court of Texas at Waco and the action of the Supreme Court of the State of Texas in refusing the Application for Writ of Error (no reversible error), thereby making final the judgment of the Court of Civil Appeals.

OPINIONS BELOW

Attached hereto as Appendix "A" is the Opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco, along with notices received from the Supreme Court of Texas refusing the Application for Writ of Error (no reversible error) and overruling Motion for Rehearing.

JURISDICTION

The Order overruling Motion for Rehearing was entered by the Supreme Court of Texas on November 1, 1972. This Petition for Writ of Certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C.A., Sections 2104 and 2106.

QUESTION PRESENTED FOR REVIEW

Whether the holding of the Texas Courts deprives Petitioner of a property right without due process of law in violation of the Fourteenth Amendment of the United States Constitution and the Bill of Rights of the Texas Constitution.

STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution reading as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property,*

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added).

28 United States Code Annotated, Section 2104 reading as follows:

"An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States."

28 United States Code Annotated, Section 2106 reading as follows:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Article I, Section 13 of the Bill of Rights of the Constitution of the State of Texas reading as follows:

"Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. *All courts shall be open,* and every person for an injury done him, in his lands, goods, person or reputation, *shall have remedy by due course of law.*" (Emphasis added).

Article I, Section 19 of such Bill of Rights of the Constitution of the State of Texas reading as follows:

"Sec. 19. *No citizen* of this State *shall be deprived of* life, liberty, *property,* privileges or immunities, or in any manner disfranchised, *except by the due course of the law* of the land." (Emphasis added).

STATEMENT OF FACTS

Petitioner, a registered pharmacist, filed suit for damages in the District Court of the State of Texas charging Respondent and another party with interfering with the practice by Petitioner of his profession and damaging his professional reputation. The suit was based on a charge filed by Respondent before the Texas State Board of Pharmacy (Pharmacy Board) alleging Petitioner had violated a Texas Statute prohibiting "substitution". Petitioner's license was suspended and Petitioner appealed to the Texas Courts. The Supreme Court of Texas ruled in favor of Petitioner and permanently enjoined the action taken by the Pharmacy Board. The opinion of the Supreme Court of Texas appears at 390 S.W.2d 252 and is attached hereto as Appendix "B".

The trial of the instant case was before a jury and the jury found, among other things, that Respondent was actuated by malice and that Petitioner had suffered actual damages of $14,670.34 and was entitled to exemplary damages of $15,000.00. The charge of the Court and verdict of the jury appear in the Transcript at pages 131-138 and the same is attached as Appendix "C". The Texas District Court entered judgment in favor of Respondent (Tr. 160-161) (attached as Appendix "D") and the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco affirmed such judgment, rendering the opinion attached as Appendix "A". As stated, the Supreme Court allowed such judgment to stand as final.

REASONS FOR GRANTING THE WRIT

The basis of the action of the Texas Courts, depriving Petitioner of a property right guaranteed him by the Constitution of the United States and the Constitution of Texas, is that any communication in the course of a judicial proceeding is "absolutely privileged". The following excerpt is from the opinion attached as Appendix "A":

> "And any communication, oral or written, made in the course of a judicial proceeding is absolutely privileged; such rule applies to proceedings before boards and commissions which exercise quasi-judicial powers; and where there is an absolute privilege, no action in damages will lie for such communication, even though same be false and uttered or published with malice. Reagan v. Guardian Life Ins. Co., S.Ct. 166 S.W.2d 909; Aransas Harbor Terminal Ry. Co. v. Taber, S.Ct. 235 S.W. 841; Thornton v. Rio Grande Nat. Life Ins. Co. CCA, NRE. 367 S.W.2d 950.
>
> "Robins had a right and privilege to make a complaint, based upon its findings, to the State Board of Pharmacy, and to communicate with the Board upon the matters involved. In doing so Robins followed legally designated procedures through the proper authorities, and its actions are absolutely privileged, and provide no basis for redress in damages."

Petitioner takes the position that:

(1) He was damaged by the unwarranted action of Respondent in filing a false charge before the Pharmacy Board.

(2) The right to earn a livelihood is a valuable property right and Respondent interfered with that right.

(3) The jury found damages, both actual and exemplary.

(4) The jury found Respondent was motivated by malice.

(5) There can be no "absolute privilege" when one files a malicious charge before a quasi-judicial body as Respondent did in the instant case.

(6) The holding of the Texas Courts deprives Petitioner of a valuable property right—a cause of action against Respondent for damages—without due process of law and in violation of both the United States Constitution and the Texas Constitution.

There can be no question that the right to follow one's chosen profession and the right to earn a living is an "inalienable" right. It is a property right guaranteed to all individuals by the statutory provisions referred to above and cannot be taken away except by "due process of law".

In *Hotel & Restaurant Employees' International Alliance & Bartenders' International League of America et al v. Longley et al*, 160 S.W.2d 124, n.w.h., the Eastland Court of Civil Appeals of Texas makes the following statement:

> "In the American way of life there are, as declared in the historical Declaration of Independence, some rights which are 'unalienable', [sic]. As said in Allgeyer v. State of Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832, quoted by Chief Justice Conner in Webb v. Cooks', Waiters' & Waitresses' Union, Tex.Civ.App., 205 S.W. 465, 468, 'The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration

of Independence. * * * This right is a large ingredient in the civil liberty of the citizen.' "

In *Francisco v. Board of Dental Examiners et al,* 149 S.W.2d 619, writ ref., The Austin Court of Civil Appeals of Texas said:

"The right to practice a profession has been called a property right, but it is more. To obtain a license and proficiency requires the expenditure of money and years of preparation, attended by toil and self-denial. Such right is the capital stock of its possessor from which dividends are expected sufficient to protect him from the infirmity of old age, and to provide his family with the comforts of life. There is moreover a prestige and good name and should be a pride attached to the practice of an honorable profession superior to any material possessions. To cancel a professional license is to take the entire capital stock of its possessor and to leave him in most instances the equivalent of a bankrupt. But it does much more than this; it takes from him his professional standing and in a manner whatever good name he has, which leaves him 'poor indeed.' "

The Texas Court of Criminal Appeals in *Ex parte Martin,* 74 S.W.2d 1017 (citing the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution) held the constitutional guarantee forbidding the taking of property without due process guarantees the right to pursue any lawful business.

In *Smith v. Decker,* 312 S.W.2d 632 the Supreme Court of Texas was dealing with the question of one's property right to earn a living. Discussing that property right, the Texas Court said:

"That a right to earn a living is a property right within the meaning of our Constitution was early established by the United States Supreme Court in the Slaughter House cases, 16 Wall 36, 21 L.Ed. 394, and a person cannot be deprived of it by simple mandate of the legislature." (Emphasis added).

The United States Supreme Court has held on numerous occasions that one's right to follow a chosen profession without undue interference is protected by the United States Constitution. *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 Sup.Ct. 1400. In a footnote to the above case this Honorable Supreme Court, commenting on the fact that certain action taken by an individual against another caused the latter substantial injury said:

"... and, were they the subject of a suit between private persons, they could be attacked as an invasion of a legally protected right to be free from arbitrary interference with private contractual relationships."

Granting that Petitioner had the inalienable right to practice his profession as a pharmacist, it follows that such a right is a property which cannot be taken from Petitioner without "due process of law" or "due course of law". This property right is protected by both the United States Constitution and the Texas Constitution in line with the statutory provisions appearing on pages 2-3 hereof.

Petitioner's right to practice his profession having been maliciously interfered with by Respondent, Petitioner has a cause of action for damages against Respondent. This is a valuable property right and is protected under the United States and Texas Constitutions.

The Texas Courts have always held that a citizen has the right to resort to the Courts to redress a wrong. This is in keeping with Section 13, Article I of the Bill of Rights of the Texas Constitution which provides:

"All courts shall be open, and every person . . . shall have remedy by due course of law."

This likewise follows Section 19 of Article I of the above Constitution which provides:

"No citizen . . . shall be deprived of . . . property . . . except by the due course of the law . . ."

The Supreme Court of Texas in a 1916 decision commented on this right in the case of *Middleton v. Texas Power & Light Co.*, 185 S.W. 556. The Texas Supreme Court said:

"It is therefore not to be doubted that *the Legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another.* Such a cause of action may be said to be protected by the Constitution and could not be taken away; nor could the use of the courts for its enforcement be destroyed." (Emphasis added).

In *Hott v. Yarbrough*, 245 S.W. 676, the Commission of Appeals of Texas held that a letter to a County Attorney charging a violation of the criminal laws is absolutely privileged, malicious intent being immaterial. The Court pointed out that putting in motion the processes the Courts would not furnish a ground for a civil action in damages. However, it went on to say:

"It is different, however, where property rights are invaded by the illegal seizure of property under attachment or other process. But in such cases the damages are limited to those resulting from the

wrongful taking or detention of property, and not for any injury which may arise from the bringing of the action or any allegations or statements made therein. Likewise when one is arrested on a false charge, and the party causing the arrest did so maliciously and without probable cause, redress may be had in any action for false imprisonment. *But here again, the gist of the action is the illegal arrest, and not the bringing or instigation of the charge.* And if there be no arrest no action arises. Usher v. Skidmore and Johnson v. King, above." (Emphasis added).

In the Texas Courts, a special "privilege" has been historically extended to municipal authorities so they were excused from liability if their agents caused an injury while engaged in a "governmental capacity". However, in balancing the public good against private right, the Texas Courts have narrowed the "privilege" thus extended. In *Lebohm v. City of Galveston*, 275 S.W.2d 951, the Supreme Court of Texas held that a provision in the Galveston City Charter excusing the City from liability for injury caused by a defective street violated the constitutional privilege conferred by Article I, Section 13 of the Texas Constitution. *The Court held the Legislature was prohibited by the Constitution from withdrawing a legal remedy from one having a go cause of action established by the common law* and in doing so said:

"We said that Section 13 of Article I of our Constitution denies 'to legislative bodies the right to arbitrarily abolish causes of action against municipalities where such causes of action are well established and well defined in the common law.' Perhaps it would have been more in keeping with the language of the constitutional provision had we said

that it prohibited legislative bodies from arbitrarily withdrawing all legal remedies from one having a cause of action well established and well defined in the common law, but the practical result would have been the same, the only distinction being an unimportant phrasing."

It is an abuse of the "privilege" granted in connection with a communication with a quasi-judicial body to extend the protection of such privilege to a malicious charge.

This Honorable Supreme Court in discussing First Amendment rights in a recent decision stated that one may not use the powerful defense of "privilege" in invoking the processes of an administrative body if the intent of the complaining party is to damage the individual against whom the complaint is made. *California Motor Transport Company et al v. Trucking Unlimited et al,* 92 S.Ct. 609 (January 13, 1972). In that case this Honorable Court said:

> "First Amendment rights may not be used as the means or pretext for achieving 'substantive evils' . . . If the end result is unlawful, it matters not that the means used in violation may be lawful."

The above language is most applicable in the instant case where Respondent abused the administrative processes, claimed privilege, was motivated by malice and attempted to achieve an improper end. Petitioner takes the position that the defense of "privilege" was not meant to protect anyone with such an improper motive and that Petitioner should not be deprived of his day in Court–a property right guaranteed by the Constitution–by such an abuse of the valuable protection of "privilege".

Petitioner submits this is the type of case in which the Honorable United States Supreme Court has granted writ of certiorari and protected the rights of an individual when a State has denied him those rights. This Supreme Court has often said that it is not so much concerned with a construction or interpretation of State law by a State Court, but more importantly, with the effect and operation of such law as it has been used or put in force by a given State. See *Corn Products Refining Co. v. Eddy, et al,* 39 S.Ct. 325; *Amalgamated Food Employees Union Local 590, et al v. Logan Valley Plaza, Inc., et al,* 61 S.Ct. 586, 312 U.S. 359 and *Near v. State of Minnesota, ex rel. Olson, Co. Atty,* 51 S.Ct. 625, 283 U.S. 697.

Petitioner has no other means by which to protect the valuable property right which has been denied him by the Courts of Texas. It is for this reason that he files this Petition for Writ of Certiorari.

CONCLUSIONS

Petitioner was severely damaged by a malicious action taken by Respondent. Petitioner is supported by a jury verdict both on the question of damages and a finding of malice.

Petitioner's right to pursue his profession as a pharmacist is guaranteed him by the Constitution of the United States and the Constitution of Texas.

Respondent interfered with Petitioner's right to pursue his profession, thereby creating a valuable property right—a cause of action for Petitioner.

The United States Constitution and the Texas Constitution states that property may not be taken from Petitioner without due process of law.

The holding by the Texas Courts that Respondent had "absolute privilege" when it filed a malicious charge against Petitioner before a quasi-judicial body deprived Petitioner of a valuable property right without due process of law.

For these reasons, Petitioner respectfully requests that this Petition for Certiorari be granted.

Respectfully submitted,

MORRIS I. JAFFE

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Dallas, Texas 75201

Attorneys for Petitioner.

APPENDIX A

AFFIRMED 6 APRIL, 1972

NO. 5125

IN THE
COURT OF CIVIL APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT WACO

* *

JERRY I. BLOOM

Appellant

v.

A. H. Robins Company, Inc., And
Holloway Associates, Inc.,

Appellees

* *

From 95th District Court
Dallas County, Texas

* * * * * * * * * * *

OPINION

* * * * *

This is an appeal by plaintiff Bloom from a take nothing judgment, in a suit against defendants Robins and Holloway, for conspiring to have his pharmacists license suspended, interfering with his practice of his profession, and damaging his professional reputation.

Plaintiff Bloom sued defendants Robins, a pharmaceutical manufacturing company, and Holloway, a detective agency, alleging: he had been a respected pharmacist employed by Dorchester House Pharmacy in Dallas; that his professional integrity had never been questioned; that Robins manufactures a number of drugs including "olixir donnatal"; that it sometimes investigates pharmacies handling donnatal to insure donnatal is being dispensed when prescribed, and no other drug is being substituted for it. In December 1962, Robins arranged to have two prescriptions for donnatal filled by plaintiff at Dorchester House, using an employee of Holloway as "shopper". Plaintiff filled the prescription from a bottle labeled "donnatal". Holloway mailed the filled prescriptions to Robins who analized the contents of the liquid sent, and reported to the Texas State Board of Pharmacy that it did not contain donnatal, and that plaintiff had committed acts of "substitution". The Board instituted proceedings against plaintiff and suspended his pharmacy license in April 1963. Plaintiff appealed such decision to the courts, and the Supreme Court of Texas resolved the matter in plaintiff's favor and permanently enjoined the Board from suspending plaintiff's license. Plaintiff asserted the charge of "substitution" against him was false, made with malice, and sought $15,000 actual and $50,000 exemplary damages against defendants.

Trial was to a jury which found:

1) Suspension of plaintiff's license to practice pharmacy was proximately caused by Robins collection and presentation of charges and evidence to the State Board of Pharmacy.

2) The charges and evidence were true.

3) Plaintiff did not know at the time he filled the prescriptions that the bottle he filled the prescriptions from did not contain donnatal.

5) Defendant Robins was actuated by malice in the collection and presentation of charges and evidence to the State Board of Pharmacy.

6) Defendant Holloway was not actuated by malice.

7) Plaintiff was damaged $14,670.34.

8) Plaintiff should be awarded $15,000. exemplary damages.

Plaintiff moved for judgment requesting the trial court disregard issue 2, and render judgment for him; defendants moved for judgment, asserting as a matter of law they were entitled to judgment. The trial court sustained defendant's motions, and rendered judgment plaintiff take nothing.

Plaintiff appeals on 4 points contending:

1) The trial court erred in overruling plaintiff's motion for judgment in that plaintiff was entitled to judgment on the basis of issues 1, 3, 5, 7, and 8.

2) The trial court erred in refusing to disregard issue 2, and render judgment for plaintiff.

Plaintiff is a pharmacist employed by Dorchester House Pharmacy. Defendant Robins manufactures donnatal, and employed Holloway to present two prescriptions to Dorchester Pharmacy. Plaintiff filled the prescriptions from a bottle labeled "donnatal", which he believed contained donnatal. Robins analized the filled prescriptions, found they did not contain donnatal, and reported to the State Pharmacy Board plaintiff had committed acts of "substitution". The Board suspended plaintiff's license as a pharmacist. Plaintiff appealed to

the court which permanently enjoined the Board from suspending his license.[1]

Robins had a right to investigate the practice of a pharmacy to determine if it was dispensing donnatal when prescribed by a physician. See: Harang v. Aetna Life Ins. Co. CCA. NRE. 400 SW 2d 810.

And any communication, oral or written, made in the course of a judicial proceeding is absolutely privileged; such rule applies to proceedings before boards and commissions which exercise quasi-judicial powers; and where there is an absolute privilege, no action in damages will lie for such communication, even though same be false and uttered or published with malice. Reagan v. Guardian Life Ins. Co. S. Ct. 166 SW 2d 909; Aranocs Harbor Terminal Ry. Co. v. Taber, S. Ct. 235 SW 841; Thornton v. Rio Grande Nat. Life Ins. Co. CCA. NRE. 367 SW 2d 950.

Robins had a right and privilege to make a complaint, based upon its findings, to the State Board of Pharmacy, and to communicate with the Board upon the matters involved. In doing so Robins followed legally designated procedures through the proper authorities, and its actions are absolutely privileged, and provide no basis for redress in damages.

---

[1]Bloom v. Texas State Board of Pharmacy, S. Ct. 390 SW 2d 252, held under the statute authorizing suspension of a pharmacists license upon a finding the licensee had engaged in an act of "substitution" in dispensing drugs, that *scienter* or *knowledge* of the substitution by the pharmacist is essential to the right of the Board to suspend his license which Bloom did not have.

The judgment is correct. Plaintiff's points and contentions are overruled.

FRANK G. McDONALD
Chief Justice

CLERK'S OFFICE – SUPREME COURT

Austin, Texas, Oct. 4, 1972

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of BLOOM v. A.H. ROBINS CO. ET AL., No. B-3421, was this day refused. No reversible error. Conditional application for writ of error dismissed.

Very truly yours,
GARSON R. JACKSON, Clerk

CLERK'S OFFICE – SUPREME COURT

Austin, Texas, Nov. 1, 1972

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of BLOOM v. A.H. ROBINS CO. ET AL., No. B-3421, was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX B

Jerry Irving BLOOM, Petitioner,
v.
TEXAS STATE BOARD OF PHARMACY,
Respondent.

No. A-10431.

Supreme Court of Texas
March 10, 1965

Rehearing Denied April 21, 1966

Proceeding wherein the District Court, Dallas County, Charles E. Long, Jr., J., entered a judgment enjoining the Board of Pharmacy from enforcing an order suspending a pharmacist on a charge of substitution of drugs. The Court of Civil Appeals, Bateman, J., 382 S.W.2d 496, reversed the judgment of the District Court, and to review the judgment of the Court of Civil Appeals, the pharmacist brought error. The Supreme Court, Smith, J., held that under statute authorizing the revocation or suspension of a pharmacist's license upon finding that a licensee has engaged in act of "substitution" in dispensing of drugs, scienter, or knowledge of substitution, is essential to right of Pharmacy Board to suspend the license of a licensee.

Judgment of Court of Civil Appeals reversed and that of trial court affirmed.

Norvell and Griffin, JJ., dissented.

Under statute authorizing the revocation or suspension of a pharmacist's license upon finding that a licensee has engaged in act of "substitution" in dispensing of drugs, scienter, or knowledge of substitution, is essential to right of Pharmacy Board to suspend the license of a licencee. Vernon's Ann.Civ.St. art. 4542a, §12(h).

See publication Words and Phrases for other judicial constructions and definitions.

Wynne Jaffe & Tinsley, Dallas, Parker & Williams, Irving, for petitioner,

Waggoner Carr, Atty. Gen., Austin, J.C. Davis and Paul Phy, Asst. Attys. Gen., for respondent.

SMITH, Justice.

The Respondent, The Texas State Board of Pharmacy, after notice and hearing on the 19th day of April, 1963, found Jerry Irving Bloom, a registered pharmacist, guilty[1] of the charge of violating Article 4542a, Section

---

1. "On the *17th* day of *April*, 1963, came on to be heard the complaint filed with the Texas State Board of Pharmacy, charging you with the offense of violating Article 4542a, Revised Civil Statutes of Texas, Section *12* and *(h)*, Subsection ____ and ____; And the Texas State Board of Pharmacy having heard the evidence and testimony in regards to the above charges and complaints, and after due deliberation thereon, did find you the said *JERRY IRVING BLOOM* guilty as charged; And it was accordingly ordered by the Texas State Board of Pharmacy that: Your pharmacist's certificate #11253 be suspended for three (3) years and all but the first sixty (60) days of said suspension be placed on probation under the condition

12(h), Vernon's Annotated Statutes. Section 12(h) provides that the Pharmacy Board may in its discretion cancel, revoke or suspend the license of any pharmacist if the Pharmacy Board finds after hearing that a licensee has engaged in the act of "substitution" in the dispensing of drugs. The Act defines "substitution" as meaning "* * * the dispensing of a drug or a brand of drug other than that which is ordered or prescribed without the express consent of the orderer or prescriber." Section 12(h) goes further to provide that:

> "If the consent of the orderer or prescriber for substitution by the licensee is obtained, a notation shall be made by the licensee on the prescription stating that such consent has been obtained and by whom such consent was given, and such notation shall, in addition, specify the drug or brand of drug so substituted."

On May 3, 1963, Bloom filed in the District Court of Dallas County, his appeal from the Pharmacy Board's order suspending his pharmacist's certificate. The petition alleged that the Pharmacy Board's finding were not reasonably supported by substantial evidence, and that the evidence wholly failed to establish a violation of the law as charged; that the action of the Pharmacy Board was arbitrary, illegal, invalid and of no effect in that the order was not only without support in substantial evidence, but to the contrary the evidence showed that he had not violated the law, as charged; that he "had acted in good faith, had no intention to violate any law

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that no violation occurs during the three (3) year period of suspension. Upon the receipt of the notice you will return your certificate No. 11253 and your renewal license #3540 to the Board's office. At the end of sixty (60) days, the certificate and renewal will be returned to you."

or regulation governing Plaintiff's conduct as a registered pharmacist and that there was no basis for any complaint against the Plaintiff." There is no contention that the druggist was negligent in any respect or that he filled the prescription by mistake.

On May 3, 1963, the trial court entered a temporary restraining order without notice to the Pharmacy Board based upon Bloom's verified application therefor, restraining and enjoining the Pharmacy Board from enforcing its April 19, 1963, order.

On May 10, 1963, the Court, after considering Bloom's pleadings, the Pharmacy Board's general denial and the evidence offered by both parties, granted a Writ of Injunction decreeing that the Temporary Restraining Order entered on May 3, 1963, be "continued in force and effect as a Temporary Injunction" pending final hearing of the cause.

On August 26, 1963, after a hearing of the cause on its merits, the trial court rendered its judgment granting a permanent injunction in favor of Bloom and against the Pharmacy Board, holding that the Pharmacy Board's order was not reasonably supported by substantial evidence and was invalid. The trial court ordered that "the Defendant Texas State Board of Pharmacy, its servants, agents and/or employees be, and they are hereby, restrained and enjoined from enforcing or carrying out its order of April 19, 1963, and from suspending, revoking or cancelling Plaintiff's certificate and license to practice pharmacy, * * *"

The Pharmacy Board, on appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, won from that Court a judgment reinstating its order of April 19, 1963, and dissolving the permanent injunction

which had been granted by the trial court on August 26, 1963. 382 S.W.2d 496.

We reverse the judgment of the Court of Civil Appeals and affirm that of the trial court.

The facts are undisputed. Bloom dispensed a substance in two small bottles to a representative of A.H. Robins Company by pouring said substance from a one-gallon container, Bloom's Exhibit 5, bearing the A.H. Robins Company "Donnatal" label. The one-gallon "Donnatal" container had been purchased by Bloom's employer from a wholesale drug house; Bloom had never tampered with, or altered the contents of the Donnatal container; Bloom had no reason to believe that the bottle contained anything other than Donnatal; and Bloom believed that the substance dispensed was actually Donnatal. In addition to these admitted facts, the Pharmacy Board gives emphasis to the fact that fifteen[2] tests were made by an

2. Fourteen of these tests were: (1) the refractive index test; (2) the specific gravity test; (3) the pH. test; (4) the color absorbancy test; (5) the taste test; (6) the odor test; (7) the alcohol test (this test was 22.0 per cent, and was within the specifications for Donnatal elixir); (8) the phenobarbital content test (this test showed 14.0 milligrams per 5 cc'a., and tnis was lower than Robins Company minimum specifications of 15.4 milligrams); (9) the alkaloid test (this test was positive and normal with Donnatal elixir); (10) the optical rotation test; (11) the optical rotation test again after sixty minutes (the first test showed the optical rotation was 23.2 degrees–the second optical rotation test showed the rotation was minus 10.00 degrees. The chemist testified that the lowest for Donnatal would be plus 66 degrees); (12) the fructose test (the sample contained fructose; "this is entirely different from Donnatal elixir"); (13) the reducing sugar test; and (14) the running of a tracer test. Although the chemist testified to making these tests, he admitted that he could not determine what the substance was.

A.H. Robins Company chemist in making an analysis of the dispensed substance, and that, in the opinion of the chemist, the substance analyzed was "definitely imitations of Donnatal elixir." The record shows that ten of the fifteen tests showed that the substance analyzed was different from the A.H. Robins Company Donnatal elixir specifications. The chemist admitted that five of the tests "ran the same on the substance that came out of Plaintiff's Exhibit 5, as run on Donnatal." The chemist testified on cross-examination that the A.H. Robins Company did not ship Donnatal directly to the Dorchester Pharmacy, but shipped it to a wholesaler in Dallas, Texas, and that he did not know "what happened to this bottle while it was in the hands of the wholesaler."

The principal contention of Bloom is that the evidence shows conclusively that he did not violate the law in any manner when he filled the prescriptions describing a drug known as "Donnatal." The Pharmacy Board takes the position that the Statute, especially Section 20[3] of Article 4542a, supra, which provides that the practice of pharmacy in the State of Texas is a professional practice affecting the public health, safety and welfare, does not require intent to violate the Statute, and that the Legislature did not intend to make scienter an element. If

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3. "The practice of pharmacy in the State of Texas is declared a professional practice affecting the public health, safety, and welfare and is subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the practice of pharmacy, as defined in this Act, merit and receive the confidence of the public and that only qualified persons be permitted to practice pharmacy in the State of Texas. This Act shall be liberally construed to carry out these objects and purposes."

intent is not required, then the order is supported by substantial evidence.

The answer to the question turns on our interpretation of the Statute, particularly the meaning intended to be given by the Legislature to the word "substitution" contained in the Statute. We hold that when the Legislature defined the word "substitution" in the Act as meaning "* * * the dispensing of a drug or a brand of drug other than that which is ordered or prescribed without the express consent of the orderer or prescriber," it meant to provide that before a guilty finding will be allowed to stand, the evidence must establish a conscious substitution. We recognize that it is not the province of this Court to substitute itself for the Pharmacy Board in determining the wisdom or advisibility of the order in question, but this Court will only sustain the order upon a determination that the Pharmacy Board's conclusions are supported by substantial evidence. In sustaining the judgment of the trial court in this cause, we recognize the rule that the Pharmacy Board's order is presumed to be valid, and the burden rests with Bloom to show that the Pharmacy Board's order of April 19, 1963, is not reasonably supported by substantial evidence. Under our decisions an administrative order is reasonable, as a matter of law, if it is supported by substantial evidence. The evidence in this case shows conclusively that Bloom had no intention to substitute one drug for another. The Pharmacy Board cites Sutherland Statutory Construction, 3rd Edition, Vol. 3, Section 7202,[4] pp. 397-398, in

4. "Since a very early time the courts have been committed to the doctrine of giving statutes which are enacted for the protection and preservation of public health an extremely liberal construction for the accomplishment of their objectives. The public and social purposes served by such legislation greatly exceed the

support of its contention that statutes such as this, which are enacted for the protection and preservation of public health, should be liberally construed in order to accomplish their objectives. The Pharmacy Board contends that Bloom has no escape from the force of the Statute, which provides a penalty for the violation, merely because he acted without fault.

We decline to adopt the view expressed by the Pharmacy Board that this Statute "dispenses with the conventional requirement for criminal conduct * * * awareness of some wrongdoing" and that "in the interest of larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in relation to a public danger." This was the view expressed in the case of United States v. Dotterweich, (1943) 320 U.S. 277, 281, 64 S.Ct. 134, 136, 88 L.Ed. 48, and adopted by the Court of Civil Appeals in this case. The Pharmacy Board, in urging this court to adopt its view, lifts from the case of United States v. Hohensee, (3 Cir. 1957) 243 F.2d 367, 371, cert. den. 353 U.S. 976, 77 S.Ct. 1058, 1 L.Ed.2d 1136, the statement of the Court that:

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inconvenience and hardship imposed upon the individual, and therefore the former is given greater emphasis in the problems of interpretation. Therefore the courts are inclined to give health statutes a liberal interpretation despite the fact that such statutes are primarily penal in nature and frequently impose criminal penalties. In most cases the proper enforcement of health laws is dependent upon administrative officers and agencies upon whom the efficacy of such legislation is dependent. While the courts have usually employed a rather rigid interpretation of statutes granting powers to administrative agencies, this rule has notably been relaxed in the interpretation of statutes granting powers to boards having control over public health."

"the Act imposes criminal sanctions as a means of regulating activities so dangerous to the public welfare as not to permit of exception for good faith or ignorance. A person acts at his peril in this field."

In the Hohensee case the defendants were indicted on nine counts for causing the introduction and delivery for introduction into interstate commerce of misbranded drugs contrary to the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. §321 et seq. Act, 21 U.S.C., defined "labeling" as meaning "* * * all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." "(g) The term drug means * * * (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals." The Act prohibited the "introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is adulterated or misbranded." In addition to the label on the drug container, the defendants delivered lectures and distributed printed material dealing with most chronic diseases. The Court in holding that the Act imposes sanctions as a means of regulating "activities so dangerous to the public welfare as not to permit of exception for good faith * * *" was concerned with a different *Act* than involved in the present case, and was dealing with a factual situation reflecting fraud and misrepresentation of a drug through the use of false and misleading literature. The Court cited the case of Kordel v. United States, (1948) 335 U.S. 345, 69 S.Ct. 106, 93 L.Ed. 52, to support its holding. The Kordel case is factually very similar to the facts in Hohensee. In Kordel the misbranding consisted of statements in circulars or pamphlets distributed "to consumers by the vendors of the pro-

ducts, relating to their efficacy." Kordel supplied the pamphlets as well as the products to the vendors. Of the twenty counts in the information filed against Kordel, seven charged that the drugs and literature were shipped in the same cartons. The literature involved in the other counts was shipped "separately from the drugs and at different times–both before and after the shipments of the drugs with which they were associated." The main issue presented in Kordel was the question of whether the separate shipment of the literature saved the drugs from being misbranded within the meaning of the Act. The Court held that "the phrase 'accompanying such article' is not restricted to labels that are on or in the article or package that is transported." The Kordel case involved the use of false and misleading literature designed for use in the distribution and sale of drugs. Under the record thus presented, the United States Supreme Court affirmed the conviction of Kordel for the offense of introducing or delivering for introduction into interstate commerce misbranded drugs. In both the Hohensee and Kordel cases the judgment of the Court was based on facts showing a fraudulent misrepresentation through the use of false and misleading literature.

It is argued that the absence of the word "knowingly" or the word "intentionally" from the Statute indicates that "the Legislature was declaring the public policy of this State to be that the substitution of one drug or brand of drug for that ordered or prescribed would be sufficient ground for revoking, cancelling or suspending a pharmacist's license, regardless of the good faith or unawareness of wrongdoing on the part of the pharmacist."

The Court of Civil Appeals in adopting this theory and in holding that Bloom should be held guilty, says that such a public policy is quite consistent with that declared

by our Supreme Court in Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835, 840, 142 A.L.R. 1424. This case held that "a retailer who sells unwholesome food for human consumption is liable to the consumer for the consequences under an implied warranty imposed by law as a matter of public policy, even though the food is in sealed containers bearing the label of the manufacturer and the retailer has no means of knowing that the contents are unfit for human consumption." We find no case in this or any other jurisdiction which applies this rule to a factual situation where, as here, all of the evidence establishes a complete unawareness of any wrongdoing. See Whiteley v. Webb's City, 55 So.2d 730 (Fla., 1951); Watkins v. Jacobs Pharmacy Co., 48 Ga.App. 38, 171 S.E. 830 (1933); People's Service Drug Stores v. Sommerville, 161 Md. 662, 158 A. 12, 80 A.L.R. 449 (1932).

In the case of Garner v. Texas State Board of Pharmacy, (1957) Tex.Civ.App., 304 S.W.2d 530 (err. ref.), which the Court of Civil Appeals distinguishes, the Board revoked the license of a pharmacist under the authority of Article 4542a, Sec. 12(f), V.A.T.C.S., which says that the Board may revoke such licenses when the holder thereof "directly or indirectly, aids or abets in the practice of pharmacy any person not duly licensed to practice under this Act." This evidence showed that Garner, the pharmacist, did not know that his employer had filled a prescription in his absence, but there was evidence that drugs were missing which Garner never checked. If a pharmacist may be held innocent of this violation in the absence of knowledge which he could have easily obtained, it seems that the petitioner here, who has not more seriously endangered the public by dispensing a drug so much like that ordered that it takes a

complete and thorough chemical analysis to tell the difference, should not be branded as unprofessional for acting as prudently as the circumstances allowed. Thus, it is seen that knowledge was required in Garner. We see no reason why this subsection of the Act under consideration should be construed differently. Since Bloom had no intention to substitute one drug for another, the Pharmacy Board's order is not supported by substantial evidence.

Our decision on the points discussed renders it unnecessary to pass upon Bloom's remaining points of error.

The judgment of the Court of Civil Appeals is reversed and that of the trial court is affirmed.

GRIFFIN, NORVELL and STEAKLEY, JJ., dissenting.

CALVERT, Chief Justice (concurring).

I concur in the judgment entered.

I agree that under a proper construction of the statute, scienter, or knowledge of substitution, is essential to the right of the Board to suspend the license of a licensee.

WALKER, J., joins in this opinion.

NORVELL, Justice (dissenting).

I do not agree with the Court's approach to this case nor the decision herein which in effect reduces the responsibility of a professional pharmacist to that of a mere label reader. This is not a criminal case but one involving a statute designed to protect the public interest by providing for a board of professionals to govern and control the practice of pharmacy. This Court has now re-written a portion of the statute by re-defining the statutory definition of the term "substitution" contained

in Article 4542a, §12(h) by inserting the word "knowingly" therein. This in itself is a substitution of sorts and to my mind runs contrary to the clear intent of the Legislature. It also makes readily available the time honored defense of "I didn't know it was loaded", and turns counter to the experience of the federal authorities in effecting an efficient control over drugs and foodstuffs. I do not believe that the doctrine of *caveat emptor* should be applied to purchases of processed foodstuffs, drugs and medicines. Surely a professional pharmacist is in a much better position to know the nature and properties of chemicals that go into a prescription than is the patient-consumer. And this is true, no matter how complicated the chemical formula of a drug may be. A duty is owed by any profession to the public which it purports to serve. In my opinion the professional board has fairly discharged the obligations enjoined upon it by law. The penalty assessed by it was neither harsh nor unreasonable. This Court should not interfere with its action.

I am wholly in accord with the able opinion of the Court of Civil Appeals, 382 S.W.2d 496, and hence pretermit further discussion. I respectfully dissent from the order reversing the Court of Civil Appeals.

GRIFFIN and STEAKLEY, JJ., join in this dissent.

APPENDIX C

Form No. 295-A

No. 65-2696-D

JERRY I. BLOOM	]	IN THE DISTRICT COURT
v.	]	DALLAS COUNTY, TEXAS
A.H. ROBINS CO. INC. & HOLLOWAY ASSOCIATES, INC.	]	95TH JUDICIAL DISTRICT

CHARGE OF THE COURT

MEMBERS OF THE JURY:

This case is submitted to you on special issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

* * * * *

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the suspension of plaintiff's license to practice pharmacy was proximately caused by defendant A.H. Robins Company's collection and presentation of charges and evidence to the State Board of Pharmacy?

ANSWER "Yes" or "No"

ANSWER [Yes]

If you have answered the above issue 'yes' and only in that event, then answer:

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the charges and evidence, if any, you have found in answer to the foregoing special issue were not true?

ANSWER "They were not true" or "They were true"

ANSWER [They Were True]

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the plaintiff, Jerry I. Bloom, did not know at the time he filled the prescriptions in question that the bottle from which he filled such prescriptions did not contain elixir of Donnatal?

ANSWER "He did not know that it did not contain Donnatal"

OR "He did know that it did not contain Donnatal"

ANSWER [He Did Not Know That It Did Not Contain Donnatal]

If you have answered special issue no. 2 'they were not true' then answer the following issue, otherwise do not answer same.

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that defendant Holloway Associates, Inc. acted in concert with defendant A.H. Robins Company in the collection and presentation of charges and evidence to the State Board of Pharmacy?

ANSWER "Yes" or "No"

ANSWER _____

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that defendant A.H. Robins Company was actuated by malice in the collection and presentation of charges and evidence to the State Board of Pharmacy?

ANSWER "Yes" or "No."

ANSWER [Yes]

If you have answered the above issue 'yes', and only in that event, then answer:

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that Holloway Associates, Inc. was actuated by malice in its concerted action, if any, with defendant A.H. Robins Company, if such concerted action you have so found in answer to special issue no. 4 above.

ANSWER "Yes" or "No."

ANSWER [No]

SPECIAL ISSUE NO. 7

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and justly compensate the plaintiff for the pecuniary loss, if any, he sustained as a direct and proximate result of the suspension of his license to practice pharmacy?

ANSWER In dollars, if any, or cents, if any, or none.

ANSWER [$14,670.34]

In answering the above special issue no. 7, you may take into consideration the expenses, if any, including attorneys fees, which plaintiff incurred in defending himself against the charges brought by the State Board of Pharmacy, and in having the suspension of his license to practice pharmacy enjoined by the Courts, and such damages, if any, to the reputation of plaintiff and, such mental anguish, if any, and humiliation, if any, and embarassment, if any, which plaintiff may have sustained as a direct and proximate result of the suspension of his license to practice pharmacy.

If you have answered Special Issue No. 5 'yes' and only in that event, then answer:

SPECIAL ISSUE NO. 8

What amount of money, if any, do you find from a preponderance of the evidence that defendant A.H. Robbins Company should pay to the plaintiff as exemplary damages?

ANSWER In dollars, if any, or cents, if any, or none.

ANSWER [$15,000.00]

* * * * *

/s/ Paul Peurifoy
JUDGE PRESIDING

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

/s/ [Signature Illegible]
FOREMAN

APPENDIX D

No. 65-2696-D

JERRY I. BLOOM	]	IN THE 95TH JUDICIAL
	]	DISTRICT COURT OF
v.	]	DALLAS COUNTY, TEXAS
A.H. ROBINS CO., INC., ET AL	]	

FINAL JUDGMENT

On the 10th day of May, 1971, came on to be heard the above entitled and numbered cause, and came the Plaintiff Jerry I. Bloom, in person and by his attorneys of record, and announced ready, and came A.H. Robins Co., Inc. and Holloway Associates, Inc. by their attorneys of record and announced ready. Thereafter came John D. Rowe, a legally and duly qualified juror and citizen of Dallas County, Texas, and eleven other duly qualified jurors and citizens of Dallas County, Texas, all of whom were duly cautioned and sworn to try said cause and did, together with the Court, hear the pleadings, the evidence and the argument. After the Court submitted his main charge to the jury, the jury retired to consider the same, and did on the 13th day of May, 1971 return its verdict into open court, which verdict was received by the Court and filed after which the jury was discharged from further service in this cause.

Thereafter the Plaintiff filed his Motion for Judgement, and the Defendants A.H. Robins Co., Inc. and Holloway Associates, Inc. filed their Motions for Judg-

ment. After due hearing the Court is of the opinion that the facts and the law are such that the Defendants' Motion for Judgment should be sustained and judgment entered accordingly;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Motions for Judgment of Defendant A.H. Robins Co., Inc. and Holloway Associates, Inc. be, and they are hereby, sustained, and it is further ORDERED that the Motion for Judgment of Plaintiff Jerry I. Bloom be, and it is hereby, in all things overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff Jerry I. Bloom recover nothing from the Defendants A.H. Robins Co., Inc. and Holloway Associates, Inc., and that all costs of suit be, and they are hereby, taxed against the Plaintiff Jerry I. Bloom, for which the officers of this court may have their execution.

ENTERED this 3 day of September 1971.

/s/ Paul Peurifoy
JUDGE

ENDORSEMENT ON INSTRUMENT NO. 65-2696-D
Jerry I. Bloom vs. A.H. Robins Co., Inc., Et Al
FINAL JUDGMENT
Signed & Entered: September 3, 1971
Recorded: Volume D-19, Page 25
IN THE MINUTES OF THE 95TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

LIST OF AUTHORITIES

Arkansas Harbor Terminal Railway Co. v. *Taber*, 235 S.W. 841 (1921, Judgment adopted by Supreme Court) 4

California Motor Transport v. *Trucking Unlimited*, 92 S.Ct. 609, January 13, 1972 5

Harang v. *AEtna Life Ins. Co.*, 400 S.W.2d 810 (Tex. Civ.App., Houston, writ refused, N.R.E.) 4

Martin v. *Phillips Petroleum Co.*, 455 S.W.2d 429 (Tex. Civ.App., Houston 1970, no writ hist.) 5

McAfee v. *Feller*, 452 S.W.2d 45 (Tex.Civ.App., Houston 1970, no writ hist.) 4

Reagan v. *Guardian National Life Ins. Co.*, 166 S.W.2d 909 (Tex. 1942) 4

Thornton v. *Rio Grande National Life Ins. Co.*, 367 S.W.2d 950 (Tex.Civ.App., Waco 1963, writ ref., N.R.E.) 4

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45 *AM JUR* 2d, Interference, pp. 280-340 3

86 *CJS*, §54, Torts, pp. 976-78 3

33 *TEX JUR* 2d, Interference, pp. 93-107 3

Appendix A—Article 4542(a), Vernon's Annotated Texas Civil Statutes 7

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1036

JERRY I. BLOOM,
Petitioner,

vs.

A. H. ROBINS COMPANY, INC.,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The primary task of this Reply is to properly define the issue presented by the Petition for Certiorari for the answer to the question is clear.

Petitioner comes to this Court under the guise of a constitutional question, but when the constitutional masquerade is brushed aside, Petitioner seeks review of a

question of state law correctly decided by the Courts of Texas.[1]

Petitioner's constitutional assertion that his right to practice his profession has been denied him without due process of law does not square with the facts of this case. Indeed, it does not square with other contentions in the Petition itself, or more accurately, with the absence of certain contentions.

Specifically, Petitioner does not contend that the standards of either substantive or procedural due process of law were violated. He does not contend that the applicable Texas statute is arbitrary or unreasonable nor does he contend that he was denied notice and a fair hearing on the charge leveled against him. A brief summary of the relevant statute and the incident proceedings reveal that such a position would be untenable.

Article 4542(a), Vernon's Annotated Texas Civil Statutes, created the Texas State Board of Pharmacy comprised exclusively of registered pharmacists and invested the Board with power and authority to license pharmacists and to revoke a pharmacist's license on certain grounds and conditions set forth in the statute.

The statute authorizes the Board of Pharmacy to conduct investigations and make fact findings. Members of the general public have the right to make complaint to the Board and the right to communicate with the Board touching matters under consideration.

Respondent made complaint against Petitioner to the State Board of Pharmacy, and the Board, *in its discretion*, formally charged Petitioner with a statutory violation.

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1. The supposed constitutional question was first raised on Motion for Rehearing in the Supreme Court of Texas.

(R. 120) The Board gave Petitioner full and fair notice of the charge against him in writing and a full hearing was held in which Petitioner was represented by counsel. (R. 34-35) The Board's decision to suspend Petitioner's certificate for an effective period of sixty (60) days was appealed as provided by law.[2]

The constitutional masquerade is exposed. It is patently clear that Petitioner was not denied the right to practice his profession without due process of law.

The constitutional question having dissipated, Petitioner's insupportable contention becomes that Respondent did not have a right to make complaint to the State Board of Pharmacy.

The unanimous response of the Courts of Texas was that Respondent did have a right to make complaint to the State Board of Pharmacy and that its actions in so doing did not constitute wrongful interference.

The right to be free from interference is not absolute. Interference, if filing a statutory complaint with a quasi-judicial body can be so classified, is justified if one acts in the exercise of a right equal or superior to that of the party interfered with or in pursuit of some lawful interest or purpose. 45 *AM JUR* 2d, Interference, pp. 280-340; 86 *CJS*, §54, Torts, pp. 976-78; 33 *TEX JUR* 2d, Interference, pp. 93-107.

Respondent's complaint to the Texas State Board of Pharmacy was in pursuit of a lawful interest or purpose and was in the exercise of a right equal to that of Petitioner to practice his profession.

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2. The damages found by the jury are attorney's fees incident to the hearing and appeal afforded Petitioner pursuant to the due process of law he contends was denied.

The accepted practice in the drug industry to insure that drugs are dispensed as prescribed is known as "shopping". (R. 60-62; 70) On nine consecutive "shoppings" from 1956 to 1962 Petitioner's pharmacy filled doctors' prescriptions calling for Respondent's product by name with another substance. (R. 57; 115; 208; 232) On at least the last four occasions Petitioner substituted a less expensive imitation of Respondent's product sold by Petitioner to the public at the same price. (R. 57; 74; 208; 232)

Respondent inquired of the Texas State Board of Pharmacy what action should be taken and the State Board instructed Respondent to supply them with the name of the pharmacist and they would take appropriate action. (R. 117; 120; 134; 237)

Respondent had a right to investigate Petitioner's practice which had a direct economic effect upon Respondent and upon the integrity of its product. See *Harang* v. *AEtna Life Ins. Co.*, 400 S.W.2d 810 (Tex.Civ.App., Houston 1966, writ ref. N.R.E.) for a discussion of that right. Respondent had a right to make complaint based upon its findings to the State Board of Pharmacy and to communicate with the Board upon the matters involved. In so doing, Respondent followed legally designated procedures for airing its grievance with the proper authorities, and its action provided no basis for a civil action in damages. *Reagan* v. *Guardian National Life Ins. Co.*, 166 S.W.2d 909 (Tex. 1942); *Arkansas Harbor Terminal Railway Co.* v. *Taber*, 235 S.W. 841 (1921, Judgment adopted by the Supreme Court); *McAfee* v. *Feller*, 452 S.W.2d 45 (Tex.Civ.App., Houston 1970, no writ hist.); *Thornton* v. *Rio Grande National Life Ins. Co.*, 367 S.W.2d 950 (Tex. Civ.App., Waco 1963, writ ref. N.R.E.).

The decisions of the Courts of Texas are in complete accord with the applicable decisions of this Court. Only recently in *California Motor Transport Co.* v. *Trucking Unlimited*, 92 S.Ct. 609 (January 13, 1972), this Court held that one has the right of access to agencies and Courts within the limits of their prescribed procedures to protect its economic interests. This is precisely the right invoked by Respondent in the instant case.

Where as here, the act which causes the interference is justified, the motive for acting is immaterial. However, this Reply would be incomplete without observing that Respondent did not bear any malice or ill will toward Petitioner.

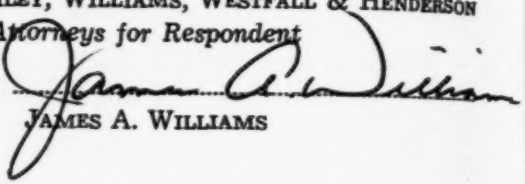
Respondent "shopped" on a nationwide basis and "shopped" over seventy pharmacies in the Dallas area alone in 1961-62. (R. 102; 110; 212-13) They did not single out Petitioner. Respondent obtained Petitioner's name only after being advised to do so by the Texas State Board of Pharmacy in order to process the complaint. (R. 117; 134; 237) Respondent acted solely to protect their financial interest and the integrity of their product. See *Martin* v. *Phillips Petroleum Co.*, 455 S.W.2d 429 (Tex.Civ.App., Houston 1970, no writ hist.).

In summary, Respondent had a right based upon its economic interest and the integrity of its product to make complaint to the State Board of Pharmacy and to communicate with the Board upon the matters involved. In so doing, Respondent followed legally designated procedures for airing such grievances through the proper authorities and their actions do not provide any basis for recovery in a civil action for damages.

Respondent respectfully submits that the Petition for Writ of Certiorari to the Supreme Court of Texas should therefore be denied.

Respectfully submitted,

JAMES A. WILLIAMS
C. EDWARD FOWLER, JR.
BAILEY, WILLIAMS, WESTFALL & HENDERSON
Attorneys for Respondent

By 
JAMES A. WILLIAMS

APPENDIX

CHAPTER EIGHT

Pharmacy

Art.

4529-4542. Repealed.

4542a. State Board of Pharmacy to regulate practice of Pharmacy; exclusion of Communists, etc.

Sec.

1. Membership; qualifications; terms; vacancies; oath.
2. Order of appointment of members; vacancies.
3. Funds received, use of.
4. Officers of board; salary; bond; by-laws and regulations.
5. Powers and duties of Board; records.
6. Meetings for examination of applicants; reports to Governor.
7. Enforcement of laws.
8. Distribution of drugs or medicines, except in original packages, unlawful; exceptions.
9. Examination; application; qualification; license; persons from other states.
10. Unlawful to impersonate applicant or fraudulently acquire license.
11. Fees; examination of books and records.
12. Revocation or suspension of license; appeal.
13. Display of certificate in place of business.
14. Annual renewal fee; practicing without renewal certificate; duplicates.

15. Stores to display "Pharmacy".

16. Unlawful use of "Pharmacy".

17. Permits for stores or factories.

18. Repeals.

19. Pharmacy, drug store, dispensary, apothecary shop or prescription laboratory defined.

20. Definitions.

4542b. Purpose of act.

Cross References

Penal provisions, see Vernon's Ann.P.C. art. 755 et seq.

Arts. 4529-4542. Repealed. Acts 1929, 41st Leg. p. 242, ch. 107 § 18

Historical Note

Articles 4529-4535, 4537-4541, repealed, were Acts 1907, p. 349; article 4542 was Acts 2nd C.S.1919, p. 88. They related to the practice of pharmacy, and defined the powers and duties of the Texas State Board of Pharmacy.

State board of pharmacy and practice of pharmacy, see, now, article 4542a.

Art. 4542a. State Board of Pharmacy to regulate practice of Pharmacy; exclusion of Communists, etc.

Membership; qualifications; terms; vacancies; oath

Sec. 1. The State Board of Pharmacy shall be composed of six (6) members to be appointed by the Governor, each of whom shall have been a registered pharmacist in this state under the provisions of law for a period of five (5) years next preceding the appointment, and who continues to be actively engaged in the practice of pharmacy

while serving the term for which he is appointed; and shall at the time of such appointment be in good standing and engaged in retail pharmacy and who is not a member of the faculty of any college or school of pharmacy, or shall have a financial interest in such school or college, and the majority of the Board shall be graduates of a recognized college or school of pharmacy. The term of office of each member of said Board shall be six (6) years. In case of death, resignation or removal of any member of the Board, the vacancy of the unexpired term shall be filled by the Governor in the same manner as other appointments. Each appointee to the State Board of Pharmacy shall within fifteen (15) days from the date of his appointment qualify by taking the Constitutional Oath of office. Provided that the present members of the Board shall serve the term for which they have been appointed. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 1.

Order of appointment of members; vacancies

Sec. 2. In making the first appointment the Governor shall appoint two members of said board for two years, two for four years and two for six years, and thereafter the term of each member shall be six years so that the terms of two members shall expire every two years. Vacancies on the board shall be filled by the Governor for the unexpired term only.

Funds received, use of

Sec. 3. The fund realized from all fees payable under this Act shall first be applied to the payment of all necessary expenses of the Board, and the remainder is to be applied by order of the Board to compensate members of said Board; said compensation to each member of the Board not to exceed Twenty-five Dollars ($25) per day, exclusive

of necessary expenses in performance of his duties. Provided, however, that the premium on any bond required of the Secretary, or any other employee of the Board, shall be paid out of said fund, as well as the expenses of any employee incurred in the performance of his duties. The State Board of Pharmacy shall defray all expenses under this law from fees provided in this Act, and the State of Texas shall never be liable for the compensation or expenses of any member of the Board, or its officers or employees, or any other expenses thereof. As amended Acts 1935, 44th Leg. p. 251, ch. 98 § 1; Acts 1943, 48th Leg. p. 710, ch. 395 § 2; Acts 1959, 56th Leg. p. 1068, ch. 489 § 1.

Officers of board; salary; bond; by-laws and regulations

Sec. 4. Said Board within thirty (30) days after appointment shall meet and organize by electing a president and vice-president and treasurer from its membership, and a secretary who may or may not be a member of the Board, whose salary shall be fixed by the Board. The secretary and treasurer shall each be required to execute a bond in the sum of Ten Thousand ($10,000.00) Dollars for the faithful performance of his duties, payable to the State of Texas. The Board shall have the power to make by-laws and regulations, not inconsistent with the law, for the proper performance of its duties and the duties of its officers and employees, and shall have the power to employ the necessary employees to carry out the provisions of this Act. As amended Acts 1951, 52nd Leg. p. 824, ch. 469 § 1.

Powers and duties of Board; records

Sec. 5. The Board shall preserve a record of its proceedings in a book kept for that purpose. A record shall be kept showing the name, age and last known mailing address of each applicant for examination, the name and location of the University, School or College of Pharmacy

from which he holds credentials, and time devoted to the study and practice of pharmacy, together with such other information as the Board may desire to record. Said record shall also show whether applicants were rejected or licensed, and shall be prima facie evidence of all matters therein contained.

The Board shall have power to appoint committees from its own membership. The duties of such committees shall be to consider such matters pertaining to the enforcement of this Act and the regulations promulgated in accordance therewith as shall be referred to said Committees, and they shall make recommendations to the Board with reference thereto.

The Board, any Committee, or any member thereof, shall have the power to issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of books, records, and documents; to administer oaths and to take testimony concerning all matters within its or his jurisdiction. The Board shall not be bound by strict rules of procedure or by the rules of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain it. The Board may be represented by the Attorney General, or by the District Attorney or the County Attorney, and by other counsel when necessary.

The Board shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this Act. Said action for injunction shall be in addition to any other action, proceeding or remedy authorized by law.

If a witness refuses to comply with said subpoena issued by said Board, or if a witness in attendance before the Board, or one of its duly appointed Committees, refuses

without reasonable cause to be examined or to answer a legal or pertinent question, or to produce books, records or papers, or to furnish other information when ordered to do so by the Board, the Board may apply to the Judge of the District Court of any county, and, upon proof of affidavit of the fact, have a rule or order, returnable in not less than one (1) nor more than five (5) days, directing such witness to show cause before the court who made the order, or any other District Judge of said county, why he should not be punished for contempt. Upon the return of such order, the Judge before whom the matter shall come for hearing shall examine under oath such witness or person, and such person shall be given an opportunity to be heard, and if the Judge shall determine that such person has refused, without reasonable cause or legal excuse, to be examined or answer a legal or pertinent question, or to produce such books, records and documents as he was ordered to bring or produce, he shall forthwith punish the offenders as for contempt of court.

Subpoenas shall be served and witnesses' fees and mileage paid, as in civil cases in the District Court in the county to which such witnesses shall be called. Witnesses subpoenaed at the instance of the Board shall be paid their fees and mileage by the Board out of the funds provided for in this Act.

The Board shall adopt an official seal and license of suitable design and shall maintain an office where all of the permanent records shall be kept. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 3.

Meetings for examination of applicants· reports to Governor

Sec. 6. The State Board of Pharmacy shall hold regular meetings for the examination of applicants for registration,

and for the transaction of such other business as may legally come before it twice a year, and may hold such additional special meetings as may be necessary. The time and place of the regular meetings shall be designated at a regular session of the Board, and the additional meetings to be held at such places and on such dates as may be designated by the President of the Board.

The Board shall make annually to the Governor of the state a regular report of its receipts and disbursements; also the names of all pharmacists duly registered under this Act during the fiscal year for which the report is made, and the names of all pharmacists whose licenses or permits have been cancelled during the fiscal year. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 4.

Enforcement of laws

Sec. 7. It shall be the duty of the State Board of Pharmacy to see that all laws which pertain to the practice of pharmacy are enforced and to cooperate with other State and Federal Agencies regarding any violations of any drug laws. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 5; Acts 1957, 55th Leg. p. 1324, ch. 447 § 2.

Distribution of drugs or medicines, except in original packages, unlawful; exceptions

Sec. 8. It shall be unlawful for any person who is not a registered pharmacist under the provisions of this Act to compound, mix, manufacture, combine, prepare, label, sell, or distribute at retail or wholesale any drugs or medicines, except in original packages. Provided that all persons now registered as pharmacists in this State shall have all the rights granted to pharmacists under this Act. Provided, however, that nothing in this Act shall apply to or interfere with any licensed practitioner of medicine,

dentistry, or chiropody, who is duly registered as such by his respective State Board of Examiners of this State, who shall supply his or her patients, as a physician, dentist, or chiropodist, and by them employed as such, with such remedies as he or she may desire and who does not keep a pharmacy, open shop, or drug store, advertised or otherwise, for the retailing of medicines or poisons; and provided, further, that nothing contained in this Act shall be construed to prevent the personal administration of drugs and medicines carried by any physician, surgeon, dentist, chiropodist, or veterinarian licensed by his respective Board of Examiners of this State, in order to supply the immediate needs of his patients; nor to prevent the sale by persons, firms, joint stock companies, partnerships, or corporations, other than registered pharmacists, of patent or proprietary medicines, or remedies and medicaments generally in use and which are harmless if used according to instructions as contained upon the printed label, with the exception, however, of exempt narcotics; and insecticides and fungicides and chemicals used in the arts, when properly labeled; nor insecticides or fungicides that are mixed or compounded for purely agricultural purposes.

Provided further, this Section shall not apply to:

(1) members of the faculty of a reputable college or school of Pharmacy recognized by the Texas State Board of Pharmacy where such faculty members who are registered pharmacists, perform their services for the sole benefit of such school or college, or to

(2) senior students of a reputable college or school of Pharmacy recognized by the Texas State Board of Pharmacy who perform their services without pay in the presence and under the direct supervision of a registered pharmacist who is a member of the staff of a reputable

college or school of Pharmacy recognized by the Texas State Board of Pharmacy, provided that the sale of such preparations and prescriptions so compounded by such senior students shall be restricted to duly registered students of the college or university attended by such senior students. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 6; Acts 1951, 52nd Leg. p. 824, ch. 469 § 2; Acts 1953, 53rd Leg. p. 916, ch. 378 § 1; Acts 1959, 56th Leg. p. 1068, ch. 489 § 2.

Examinations; application; qualification; license; persons from other states

Sec. 9. Every person desiring to practice pharmacy in the State of Texas shall be required to pass the examination given by the State Board of Pharmacy. The applicant shall make application by presenting to the secretary of the Board, on forms furnished by the Board, satisfactory sworn evidence that he has attained the age of twenty-one (21) years, is of good moral character, is a citizen of the United States, and has at least graduated from a first grade high school, or has a preliminary education equivalent thereto, permitting matriculation in The University of Texas, and that he has attended and graduated from a reputable university, school, or college of pharmacy which meets with the requirements of the Board, and shall have had at least one thousand (1,000) hours of practical experience in a retail pharmacy under the direct supervision of a registered pharmacist as follows: the applicant shall have been actually employed substantially all of one (1) year in such capacity, provided that part time employment of not more than forty (40) hours per week gained in a maximum of eight (8) hour days may be credited toward the minimum practical experience to fulfill this requirement. If the applicant does not actually work substantially all of

one (1) year in any calendar year period, the time actually worked may be added to work he may perform during the following year or years in order to fulfill one thousand (1,000) hours of practical experience. A university, school, or college of pharmacy is reputable whose entrance requirements and course of instruction are as high as those adopted by recognized universities, schools, or colleges of pharmacy, and whose course of instruction shall be the equivalent of not less than four (4) terms of eight (8) months each, and approved by the Board.

The examination shall consist of written, oral, and/or practical tests in pharmacy, chemistry, pharmaceutical jurisprudence, posology, toxicology, bacteriology, physiology, pharmacognosy, and pharmacology, and in such other subjects as may be regularly taught in all recognized universities, schools, and colleges of pharmacy.

Each applicant for license to practice pharmacy in Texas shall be given due notice of the time and place of examination. All examinations shall be conducted in writing and by such other means as the State Board of Pharmacy shall deem adequate to ascertain the qualifications of applicants, and in such manner as shall be entirely fair and impartial to all individuals in every recognized school of pharmacy. All applicants examined at the same time shall be given the same regular examinations, and each applicant successfully passing the examination and meeting all requirements of the State Board of Pharmacy shall be registered by the Board as possessing the qualifications required by this law, and shall receive from said Board a license to practice pharmacy in this State. Provided that the State Board of Pharmacy may, in its discretion, upon the payment of Fifty Dollars ($50), grant a license to practice pharmacy to persons who furnish proof that they

have been registered as such in some other state or territory, and that they are of good moral character, provided that such other Board in its examination required the same general degree of fitness required by this State, and grants the same reciprocal privileges to pharmacists of this State.

No person who is a member of the Communist Party, or who is affiliated with such party, or who believes in, supports, or is a member of any group or organization that believes in, furthers, or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods, shall be authorized to practice pharmacy in the State of Texas, or to receive a license to practice pharmacy in the State of Texas.

Every person admitted to practice pharmacy in the State of Texas shall, before receiving his license, make oath that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is neither a member of nor supports any group or organization that believes in, furthers, or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Any person who shall falsely make the affidavit prescribed in the foregoing paragraph shall be deemed guilty of fraudulent and dishonorable conduct, and malpractice, and shall be subject to all penalties which may be prescribed for making false affidavit. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 7; Acts 1951, 52nd Leg. p. 824, ch. 469 § 3; Acts 1959, 56th Leg. p. 1068, ch. 489 § 3.

Unlawful to impersonate applicant or fraudulently acquire license

Sec. 10. It shall be unlawful for any person to impersonate before the Board an applicant applying for regis-

tration or license under this Act, or to fraudulently acquire a license in any other manner than provided for in this Act.

Fees, examination of books and records

Sec. 11. The State Board of Pharmacy shall charge a fee of Twenty Dollars ($20) for examining an applicant for license, which fee must accompany the application. If an applicant who, because of failure to pass the examination, is refused a license, he shall be permitted to take a second examination without additional fee, provided the second examination is taken within a period of one (1) year. The State Auditor of the State of Texas shall, not less than once each year, examine and audit the books and records of the State Board of Pharmacy, and report his findings to the Governor of the State of Texas. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 8; Acts 1959, 56th Leg. p. 1068, ch. 489 § 4.

Revocation or suspension of license; appeal

Sec. 12. The State Board of Pharmacy may in its discretion refuse to issue a license to any applicant, and may cancel, revoke, or suspend the operation of any license by it granted for any of the following reasons:

(a) That said applicant is guilty of gross immorality;

(b) That said applicant or licensee is guilty of any fraud, deceit, or misrepresentation in the practice of pharmacy or in his seeking admission to such practice;

(c) That said applicant or licensee is unfit or incompetent by reason of negligence;

(d) That said applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;

(e) That said applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine, or other drugs having similar effect, or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

(f) That said licensee, directly or indirectly, aids or abets in the practice of pharmacy any person not duly licensed to practice under this Act; provided further, that the said licensee is responsible for the legal operation of the pharmacy, dispensary, prescription laboratory or apothecary shop as long as his name appears on the permit issued for the operation of such establishments;

(g) That said applicant or licensee has been convicted in either a State or Federal Court of the illegal use, sale, or transportation of intoxicating liquor, narcotic drugs, barbiturates, amphetamines, desoxephedrine, their compounds or derivatives, or any other dangerous or habit-forming drugs;

(h) That said licensee has engaged in the act of "substitution" as that term is hereinafter defined. The term "substitution" as used in this Act shall mean the dispensing of a drug or a brand of drug other than that which is ordered or prescribed without the express consent of the orderer or prescriber. If the consent of the orderer or prescriber for substitution by the licensee is obtained, a notation shall be made by the licensee on the prescription stating that such consent has been obtained and by whom such consent was given, and such notation shall, in addition, specify the drug or brand of drug so substituted;

(i) That said licensee is a member of the Communist Party or affiliated with such party.

Revocation, cancellation, or suspension of a license shall be only after ten (10) days notice and a full hearing.

Any person whose license to practice pharmacy has been refused, revoked, or suspended by the Board may, within twenty (20) days after the effective date of the order, decision, or ruling of the Board, take an appeal to any of the District Courts where said applicant resided at the time the offense was committed which resulted in the Board's action refusing, revoking, or suspending said license. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 9; Acts 1957, 55th Leg. p. 1324, ch. 447 § 2; Acts 1959, 56th Leg. p. 1068, ch. 489 § 5.

(The remaining sections of Article 4542(a) are not pertinent.)

CERTIFICATE OF SERVICE

This is to certify that on the 22 day of February, 1973, three copies of the foregoing Brief were mailed, properly addressed, postage prepaid, to attorney for Petitioner, Morris I. Jaffe, 1000 LTV Tower, Dallas, Texas 75201.

James A. Williams

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